

SEP 28 1942

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

B. C. SCHRAM, Receiver of First National  
Bank-Detroit, a National Banking Association,  
Petitioner.

vs.

JOSEPH L. COYNE,

Respondent.

No. 228

## REPLY BRIEF OF PETITIONER

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Of Counsel.

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Respondent's brief is divided into two portions. The first section is devoted to the argument that the Receiver's petition for a writ of certiorari should be denied, because one of the grounds alleged therefor raises a point not previously presented in this case. The second portion of respondent's brief argues the merits of the case, claiming that respondent's position is sustained by the Michigan authorities. This latter point has heretofore been discussed both in our petition and brief and we shall not argue the same further herein (pp. 5, 13-18).

With reference to the first contention, respondent argues that we are untimely in asking this court to remand this case to the District Court with instructions to refer the single question of substantive law involved to the state courts of Michigan for determination, because our initial request for such relief appears in our petition for certiorari. It is further contended by the respondent that counsel for both parties as well as both of the lower courts, encountered no difficulty in finding applicable Michigan decisions.

While the briefs filed in the lower courts are not before this Court, there can be no doubt that counsel for both petitioner and respondent took the position in both the District Court and the Court of Appeals that the single substantive question of law presented herein was governed by Michigan authorities. Counsel for the petitioner contended that the contract liability of one who accepted a deed of conveyance in Michigan in which he assumed and agreed to pay an outstanding mortgage against the property transferred was in the nature of a covenant. Counsel for the respondent took the position that that liability was in the nature of a simple contract. True it is also, that the District Court, at least inferentially, held that such liability under Michigan authorities was in the nature of simple contract.

However, in unmistakably clear and lucid language heretofore quoted in our petition and brief filed herein (pp. 9-10) the Court of Appeals differed with both the District Court and counsel for both sides and specifically held that the substantive question of law involved in this case was open and undecided in Michigan. In said court's opinion, the general weight of authority of other state court decisions pointed in the direction of constituting such liability in the nature of simple contract rather than covenant, and hence the Court of Appeals affirmed the lower court.

It is obvious, therefore, that petitioner could not have made his request for a reference to the state courts prior to the filing of his petition for a writ of certiorari herein, because the Court of Appeals in its opinion for the first time held that this question of law was open and undecided by the courts of Michigan.

Therefore, neither the arguments nor the authorities recited in respondent's brief are applicable. We do not differ with the point of view expressed by counsel for respondent that the substantive question of law involved herein has been decided by Michigan courts. As a matter of fact, in our petition and brief filed in this Court we have argued that the Michigan authorities establish that the liability of the respondent herein is in the nature of a covenant, while counsel for the respondent has similarly argued in his brief that his liability under the Michigan decisions is clearly established as that of simple contract. It is with the Court of Appeals decision that we differ, and it is because of that decision that we ask this Court to refer the substantive question of law to the state courts for final determination.

To summarize briefly, throughout this case counsel for petitioner and respondent have contended that the substantive law involved is governed by Michigan authorities, although they have reached different conclusions as to what those authorities hold. However, in clear and unambiguous language, the Court of Appeals has held that there is no Michigan authority on the point involved.

Respectfully submitted,

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